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No. 07-962

In the Supreme Court of the United States

CAVEL INTERNATIONAL, INC., *ET AL.*, PETITIONERS,

v.

LISA MADIGAN, ATTORNEY GENERAL OF ILLINOIS; RON MATEKAITIS, DEKALB COUNTY STATE'S ATTORNEY; AND TOM JENNINGS, ACTING DIRECTOR, ILLINOIS DEPARTMENT OF AGRICULTURE, RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

A 2007 amendment to the Illinois Horse Meat Act (the "Amendment") prohibits the possession and sale of horse meat for human consumption, as well as its import into (and export from) Illinois and the slaughter of horses for this purpose. 225 ILCS 635/1.5 (2007).

The question this case presents is:

Whether the Seventh Circuit correctly held that petitioners failed to present evidence that the Amendment violates the Foreign Commerce Clause by (a) discriminating facially or in effect against foreign commerce in horse meat for human consumption, lacking any rational basis, or posing more than a "slight" burden on foreign commerce that is "clearly excessive" in relation to the State's legitimate and substantial interests, and (b) impairing the national government's ability to speak with one voice about foreign commerce in horse meat for human consumption.

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BRIEF IN OPPOSITION

Petitioners' case failed below for want of proof. Petitioners did not show that the Amendment's total ban on horse meat for human consumption either discriminates against foreign commerce facially or in effect, or that it has no rational basis. They also failed to present empirical evidence that the Amendment imposes more than a "slight" burden on such commerce, much less that this slight burden "excessively outweighs" the State's legitimate animal welfare and other interests. Accordingly, the Seventh Circuit's rejection of petitioners' challenge to the Amendment was fully consistent with the Court's precedents, including *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), and with *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326 (5th Cir.), *cert. denied*, 127 S. Ct. 2443 (2007), which upheld a similar law.

Likewise, petitioners failed to present required evidence that the Amendment impairs the national government's ability to "speak with one voice" about foreign commerce in horse meat for human consumption. Thus, the Seventh Circuit's decision was also fully consistent with the Court's Foreign Commerce Clause precedents, including *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), and *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994), as well as with *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd on other grounds sub nom. Crosby v. Nat'l Foreign Trade Council*, 531 U.S. 363 (2000), which held that a state ban on investment in Burma facially discriminated against commerce with Burma *and* violated a clear

federal directive about commerce with that country. Rather than creating new law, as petitioners claim, the Seventh Circuit followed the Court's Foreign Commerce Clause precedents step-by-step, including application of the rational basis standard to state laws that do not discriminate against out-of-state commerce facially or in effect. The Seventh Circuit's decision is thus a straightforward application of what petitioners themselves call "longstanding precedents" (Pet. 4) to the scant evidence petitioners presented at trial. And while petitioners attempt to create a question over whether the Seventh Circuit allegedly came up with its own, "inducement" rationale for the Amendment (Pet. 26-28), this was not the only (or even the primary) rationale on which the court upheld the Amendment, and the State's reasons for the Amendment embodied the court's "inducement" rationale in any event.

The attempts by amici to inject several new issues into this case—whether the Amendment (a) violates the United States' obligations under three trade treaties; (b) unconstitutionally burdens interstate commerce in horses as livestock; or (c) "interferes" with enforcement of the federal Humane Methods of Slaughter Act (7 U.S.C. §§ 1901-1907)—should be rebuffed. Not only is an amicus prohibited from smuggling in issues not raised in a petition, but also these issues were not preserved below. Likewise, Belgium's attempt to augment the record with new evidence to bolster petitioners' argument that the Amendment's effect on foreign commerce in horse meat is more than "slight" should be firmly rejected, for the Court's review is limited to the evidentiary record at trial.

A separate and independent ground also counsels against granting the petition. In the 2008 fiscal year, Congress explicitly stated the federal policy toward slaughter of horses for human consumption by refusing to fund the United States Department of Agriculture's inspection regime under which horses must be slaughtered. Consol. Appropriations Act, 2008, Pub. L. 110-161, § 741, 121 Stat. 1844, 1881 (2007). A federal district court enjoined the USDA's substitute fee-for-service inspection system (*Humane Soc'y of the United States v. Johanns*, No. 06-625 (D.D.C., March 28, 2007)), and although Cavel obtained a stay of that injunction pending its appeal, that appeal was recently dismissed (*Humane Soc'y of the United States v. Cavel Int'l, Inc.*, No. 07-5120 (D.C. Cir., March 31, 2008) (per curiam)). Cavel's petition for rehearing en banc is pending as of the filing of this brief. Under these circumstances, this case presents an exceptionally poor vehicle for resolving petitioners' Foreign Commerce Clause claim, because a victory would be unlikely to have any effect whatsoever on Cavel's operations.

For all these reasons, this Court should deny the petition.

STATEMENT

1. In May 2007, the Illinois Horse Meat Act (225 ILCS 635/1 – 635/18 (2007)) was amended to, among other things, prohibit the possession, sale, or purchase in Illinois, and the export from (and import into) Illinois, of horse meat for human consumption, as well as slaughtering horses for this purpose. 225 ILCS 635/1.5 (2007).

During the legislative debates, one representative observed that Illinois law defines horses as "companion animals," like dogs and cats, and stated that they should be allowed to die of natural causes or be euthanized, distinguishing "feed animals." 95th Gen. Assem., Trans. of House Debates, April 18, 2007, at 123, 133-34. He added that "[i]t doesn't make sense" to permit the slaughter of horses for human consumption when consumption of the meat is banned. *Id.* at 116-17. One senator stated, "plain and simple, this is an animal cruelty," to permit a horse to be slaughtered for human consumption merely because it was no longer of economic use, emphasizing that few States permit this practice. 95th Gen. Assem., Trans. of Senate Debates, May 16, 2007, at 207. Another legislator expressed concern, after the bill was passed, that "[p]eople were selling horses not knowing that they were being used and treated like livestock and ended up on the slaughter room floor." Resp. 1a.

2. The day after the Amendment became effective, Cavel and some of its employees filed an eight-count complaint against respondents, who are state and county officials, seeking declaratory and injunctive relief. Pet. 6-8. Among other things, petitioners alleged that the Amendment violated the Foreign Commerce Clause, was preempted by the Federal Meat Inspection Act (FMIA) (21 U.S.C. §§ 601–695), and constituted an unlawful use of police power. Pet. 8. The district court entered a temporary restraining order, finding that petitioners had "just cleared" the "low threshold" of a "better than negligible chance of succeeding" on the merits, but only on their Foreign Commerce Clause claim. Doc. 30 at 2-4.

At a hearing pursuant to Civil Rule 65(a)(2), petitioners called only one witness, Cavel's general manager, who stated that over 99% of Cavel's business is in horsemeat for human consumption, none of which is sold in the United States. Pet. 19a-20a. He did not know whether the United States produces even 0.8% of the horsemeat consumed worldwide. Doc. 134 at 54. Petitioners' only other evidence consisted of five exhibits. *Id.* at 56-63. One was a letter to Illinois Governor Rod Blagojevich from Belgium's Minister of Foreign Affairs, stating that Belgium "will be carefully scrutinizing the compatibility of Horse [sic] Bill 1711 with international trade rules, including those existing under the World Trade Organisation." Resp. 4a-5a. Another was a press release from Governor Blagojevich, issued the day the Amendment became effective. Resp. 1a-3a. A third was the federal defendants' one-sentence response to a court order in *Humane Society* seeking their position on Cavel's motion to stay the injunction pending appeal, which merely provided that defendants "support[ed] the Motion" but gave no reason. Resp. 6a. The other two exhibits were a 1987 document from the United States Department of Agriculture (USDA), stating that inspection service was granted for Cavel because a survey of its facility indicated compliance with FMIA, and a copy of an Illinois House of Representatives debate on the Amendment. Doc. 134 at 56-63.

The district court entered judgment for respondents on the three claims petitioners raised at the hearing. Pet. 16a-40a, 41a. Relying on *Empacadora*, the court first rejected petitioners' FMIA preemption claim, finding that the federal law concerned pre- and post-slaughter inspection, whereas

the Amendment regulates which meats people may possess or consume. Pet. 23a-27a. It also rejected petitioners' claim that the Amendment had no rational basis, stressing that the rational basis test required that the Amendment be upheld so long as there was "any reasonably conceivable state of facts that could provide a rational basis," including "rational speculation unsupported by evidence or empirical data." Pet. 37a-40a (internal quotation marks omitted). The court found that the Illinois legislature could have rationally concluded that a horse's temperament, agility, and wariness made it more difficult to kill methodically than livestock, which in turn made it inhumane to slaughter a horse before its useful life ends and more humane to euthanise it with drugs and then dispose of the carcass by rendering or other means. Pet. 38a. The court further found that the Illinois legislature could have rationally concluded that the Amendment was a reasonable regulation of food for human consumption, given our country's cultural history and views about consuming companion animals, such as cats, dogs, and horses, unlike animals that are raised for food. Pet. 37a-40a.

The court also rejected petitioners' Foreign Commerce Clause claim. Pet. 27a-37a. It first found that the Amendment's complete ban on horsemeat for human consumption does not discriminate against foreign or interstate commerce. Pet. 28a-31a. Next, it found that the record did not include evidence the court would need to assess whether the Amendment placed any burden on foreign commerce in horse meat, noting that petitioners presented no evidence of how much Illinois horse meat Belgians consume or what percentage of all horse meat consumed in Belgium is

produced in Illinois. Pet. 31a-33a. The court also found significant that petitioners had neither proven what percentage of the world's horse meat supply comes from Cavel nor quantified Cavel's exports, either in total or to any particular country. Pet. 33a.

Finally, the court found that petitioners failed to prove that the Amendment impedes the federal government's ability to "speak with one voice" about foreign commerce in horse meat for human consumption, as *Japan Line* required, for their evidence did not permit the court even to begin to assess any risk of a conflict with any other country. Pet. 32a-33a. Addressing petitioners' only evidence on this point, *i.e.*, the Belgium Foreign Affairs Minister's letter, the court found that the "mere mention of an intent to examine [the Amendment] does not, in and of itself, indicate a substantial risk of [such] conflict." Pet. 32a. The court also found significant petitioners' concession that they knew of no formal or informal action by any trading partner in response to the Amendment. Pet. 32a.

Petitioners' motion for an injunction pending appeal was denied (Pet. 44a), but, over a dissent, the Seventh Circuit granted their motion for an injunction pending appeal (Pet. 43a-51a).

3. The Seventh Circuit unanimously affirmed the judgment. Pet. 1a-15a.

Addressing petitioners' Commerce Clause claim, the court first held that the only provision of the Amendment applicable to Cavel was the ban on the slaughter of horses for human consumption, which did not facially discriminate in favor of Illinois producers

or merchants. Pet. 6a-7a. Nor does the law have a constitutionally proscribed effect on interstate commerce, the court concluded, so long as it satisfies the test set forth in *Pike*: "'Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is *clearly* excessive in relation to the putative local benefits.'" Pet. 8a (quoting *Pike*, 397 U.S. at 142) (emphasis in *Cavel*).

The court then concluded that petitioners' evidence revealed that the Amendment's burden on commerce was only "slight" and that "States have a legitimate interest in prolonging the lives of animals that their population happens to like," citing bans on bullfights and cockfights as well as on animal abuse and neglect. Pet. 11a. Even if the Amendment did not in fact result in horses living longer lives, the court continued, a State "is permitted, within reason, to express disgust at what people do with the dead," such as banning the slaughter of dogs and cats for human consumption. Pet. 12a. The court also held that Illinois may balance these interests against those of its residents, and may do so a step at a time. Pet. 11a. For these reasons, the court also concluded that petitioners failed to prove that the Amendment has no rational basis. Pet. 10a.

Turning to *Japan Line*'s analytical framework, the court stressed that petitioners never presented evidence of the Amendment's effect on foreign commerce, or even evidence of Cavel's share of the European market for horse meat. Pet. 13a-14a. The court also found significant that petitioners presented no evidence of any risk of conflict: the Belgium Foreign

Affairs Minister's letter did not say that Belgium opposed the law, and petitioners presented no evidence of opposition by either another foreign government or the federal government. Pet. 14a. Concluding that the Amendment was nondiscriminatory facially and in effect, interfered only minimally with the nation's foreign commerce in horse meat for human consumption, and could not be said to lack a rational basis, the court affirmed the judgment. Pet. 14a-15a.

No petition for rehearing was filed.

4. Meanwhile, after Congress refused to appropriate funds for the USDA's mandatory inspections for horse slaughtering, the USDA enacted regulations creating a fee-for-services inspection program, which was enjoined in March 2007.[1] *Humane Soc'y of the United States*, No. 06-625 (D.D.C., March 28, 2007). The federal defendants did not appeal the injunction. Cavel, which had intervened as a defendant in that case, did appeal, and on May 1, 2007, the D.C. Circuit granted Cavel's motion to stay the injunction pending appeal, based in part on Cavel's assertion that it would "go out of business absent a stay, because it will be unable to operate during the pendency of this appeal as a result of the district court's order." *Humane Soc'y of the United States*, No. 07-5120, 2007 WL 4723381, at *1 (D.C. Cir., May 1, 2007). Cavel's appeal was dismissed as moot on March 31, 2008, but its petition for rehearing and rehearing en banc is pending as of the filing of the instant brief.

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[1] The Court may take judicial notice of these court records. Eugene Gressman *et al.*, *Supreme Court Practice*, 727-28 (9th ed. 2007).

Congress again prohibited the use of federal funds for the USDA fee-for-service inspections in the 2008 fiscal year. Consol. Appropriations Act, 2008, Pub. L. 110-161, § 741, 121 Stat. 1844, 1881 (2007). Without these inspections, no one may slaughter horses for human consumption in the United States.

REASONS FOR DENYING THE PETITION

This case does not warrant Supreme Court review. The Seventh Circuit's decision adheres to *Pike* and *Japan Line* and their progeny, and it breaks no new ground. It is also fully consistent with *Natsios*, which struck down a facially discriminatory statute barring state dealings with a particular country and in direct conflict with a clear congressional directive. Nor is this case a vehicle for addressing alleged confusion over the best articulation of the framework for evaluating Foreign Commerce Clause challenges, for—despite occasional dicta about the ongoing role of *Pike* and *Japan Line*—the Seventh Circuit reached its conclusions only by rigorously applying those precedents. And there is nothing to petitioners' complaint that the Seventh Circuit purportedly came up with its own rationale for the Amendment, when that was not the only rationale on which the court relied in upholding the law, and it was embodied by the State's articulated reasons for the legislation in any event.

The amici seek to add issues to the case and fill obvious gaps in the evidentiary record, but their belated attempts should be firmly rebuffed. And even if those new questions—involving trade treaty obligations, the Humane Methods of Slaughter Act,

and interstate commerce in livestock—were considered, none requires the Court's attention.

Lastly, but critically, petitioners ask the Court to resolve legal issues that are unlikely to have any effect on them, given Congress's refusal to fund USDA inspections for horse slaughter and Cavel's unsuccessful litigation to defend USDA regulations that would circumvent that refusal. Certiorari should be denied.

I. The Seventh Circuit's Opinion Is Correct, Breaks No New Ground, and Is Fully Consistent with This and Other Courts' Commerce Clause Jurisprudence.

According to petitioners, this Court's review is required to resolve purported "confusion" in the lower courts over the proper Commerce Clause inquiry, confusion that petitioners attribute to the Court's "inconsistent" Interstate Commerce Clause cases and its "undeveloped" Foreign Commerce Clause jurisprudence. Pet. 15-19. As described more fully below, however, the questions that petitioners seek to have this case answer are simply not presented here: there is no debate over the proper framework for resolving Foreign Commerce Clause cases, and even if there were confusion along the lines that petitioners describe, it would not be implicated in this case; nor does this case provide an opportunity to revisit the ongoing viability of *Pike* and *Japan Line*, or of *Pike*'s application in the absence of discrimination, for the Seventh Circuit expressly applied both *Pike* and *Japan Line*, meaning petitioners received the benefit of the very rules whose application petitioners (incorrectly) suggest are in question.

In fact, the bedrock principles of Commerce Clause analysis, both foreign and interstate, are well-established, and the Seventh Circuit applied those principles step-by-step to the evidence presented below.

A. *Pike*, *Japan Line*, and Their Progeny Have Created and Refined the Analytical Framework for Foreign Commerce Clause Claims.

In its "dormant" form, the Commerce Clause (U.S. Const. art. I, § 8, cl. 3) has been held to implicitly restrain state authority to regulate commerce. See, *e.g.*, *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1792-93 (2007). The general principles governing dormant Commerce Clause analysis are well-established. A law that discriminates against interstate or foreign commerce "is virtually *per se* invalid. By contrast, nondiscriminatory regulations that have only incidental effects on commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits,'" under the *Pike* balancing test. *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994) (quoting *Pike*, 397 U.S. at 142) (citations omitted). The Court has defined "discrimination" in this context as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* at 99. Of significance here are two additional principles: the Commerce Clause forbids discrimination against *commerce*, protecting the market as a whole rather than any particular enterprise (*Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127-28 (1978)), and a complete ban on a product

discriminates against that *product*, not against *commerce* therein (*Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 347 n.11 (1992)).

It is equally established that Foreign Commerce Clause claims require a more extensive inquiry—whether a state law will impair federal uniformity by preventing the national government from "speaking with one voice when regulating commercial relations with foreign governments." *Japan Line.*, 441 U.S. at 448-51 & n.14, 446. A state law survives this "one voice" inquiry so long as it neither implicates foreign policy issues that must be left to the federal government nor violates a clear federal directive. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983).

In sum, the general principles for Foreign Commerce Clause claims are well established. The Seventh Circuit's decision adhered to those principles.

B. The Seventh Circuit Applied These Well-Established Principles to the Evidentiary Record Developed Below.

The Seventh Circuit properly applied *Pike*, *Japan Line*, and their progeny and held that petitioners failed to show that the Amendment's total ban on horse meat for human consumption discriminates against commerce, either facially or in effect, or that it has no rational basis. Likewise, the court held that petitioners failed to present evidence that the Amendment posed a burden on commerce that was more than "slight," much less a burden that was "clearly excessive" in relation to the State's interest in animal welfare, as *Pike* required. Lastly, the court

held that petitioners failed to present evidence that the Amendment impairs the federal government's ability to speak with "one voice," applying *Japan Line*. These rulings are fully consistent with Foreign Commerce Clause precedent. Indeed, the confusion or debate over the Clause that petitioners attempt to show in the lower courts is entirely manufactured, and the issues that petitioners identify for this Court's resolution would not be implicated in this case in any event.

1. The Seventh Circuit's Decision That the Amendment Does Not Facially Discriminate Against Foreign Commerce in Horse Meat Is Fully Consistent with *Hughes*, *Natsios*, and *Empacadora*.

As explained above, the first step in Commerce Clause analysis is to determine whether a state law discriminates against commerce facially or in effect. Because the Amendment completely bans horsemeat for human consumption in Illinois (Pet. 56a), it manifests hostility to this product, not to commerce therein, so it is "at least nondiscriminatory." *Chem. Waste Mgmt.*, 504 U.S. at 347 n.11. Accordingly, the Seventh Circuit's conclusion that the Amendment's prohibition against slaughtering horses does not facially discriminate against commerce in horsemeat for human consumption (Pet. 7a) was dictated by *Chem. Waste Mgmt.*

Petitioners nevertheless complain that this holding conflicts with *Hughes v. Oklahoma*, 441 U.S. 322 (1979), which struck down a state law they call "indistinguishable" from the Amendment. Pet. 19-20. But the Oklahoma law facially discriminated against

interstate commerce, permitting *intra*state commerce in minnows while prohibiting *inter*state commerce therein. 441 U.S. at 336-37. In stark contrast, the Amendment prohibits *all* commerce in (or possession of) horse meat for human consumption, whether intrastate, interstate, or foreign. Thus, the Amendment is easily distinguished from *Hughes*'s facially discriminatory ban on interstate commerce. Indeed, to call the Amendment facially discriminatory would conflict with *Chem. Waste Mgmt.*'s rule that total bans on a product are "*at least* nondiscriminatory." 504 U.S. at 347 n.11 (emphasis added). The same is true of amicus Belgium's complaint that the Amendment discriminates against foreign commerce in horse meat by acting as an export ban. Belgium 4. Furthermore, under Belgium's argument, the Commerce Clause would require Illinois to permit the production of an item it bans for its residents, *e.g.*, dog and cat meat for human consumption or pornography, whenever it is produced only for export. None of the Court's precedents permits, much less requires, this absurd result.

Petitioners also contend that the Seventh Circuit's decision "stands in tension with" *Natsios*'s holding that a law need not distinguish between foreign and domestic producers to be facially invalid. Pet. 20-21 (citing 181 F.3d at 67). But *Natsios* merely held that the law at issue there, which prohibited any and all investment in Burma, was facially discriminatory because it was designed to limit commerce with a particular country. 181 F.3d at 67-68. Like the facially discriminatory law in *Hughes*, the facially discriminatory law in *Natsios* stands in sharp contrast to the Amendment, which is not a "direct attempt to

regulate the flow of foreign commerce" in horse meat for human consumption. In short, there is no "tension" between *Natsios* and the Seventh Circuit's decision.

Furthermore, the Seventh Circuit's decision is in accord with *Empacadora*, to which petitioners give short shrift because a Foreign Commerce Clause claim was not implicated there. Pet. 21 n.5. But the first step in *all* Commerce Clause cases, including *Empacadora* and the instant case, is to determine whether a state law discriminates against out-of-state commerce, and *Empacadora* held that Texas's ban on processing and selling horse meat for human consumption was not facially discriminatory because it was a "blanket prohibition" against this product. 476 F.3d at 335. This decision, like the Seventh Circuit's, was mandated by *Chem. Waste Mgmt.*'s holding that total bans are "nondiscriminatory." 504 U.S. at 347 n.11.

2. The Seventh Circuit Applied Established Law in Determining That the Amendment Does Not Discriminate in Effect.

Having concluded that the Amendment is facially nondiscriminatory, the Seventh Circuit turned to whether it nevertheless discriminates against foreign commerce "in effect," and concluded that petitioners failed to present evidence sufficient to support this argument. Pet. 7a-8a. To the extent that petitioners now argue that the Amendment's effect on Cavel, specifically, demonstrates discriminatory effect on foreign commerce in horse meat (Pet. 20), that argument would run afoul of *Exxon*'s rule that the

Commerce Clause does not protect any particular interstate enterprise. 437 U.S. at 127-28.

In the end, at issue here is merely an evidentiary dispute, for the Seventh Circuit concluded that petitioners failed to present evidence that Cavel's closing would have any non-trivial effect on foreign commerce in horse meat. Pet. 7a-8a. Indeed, the court held that petitioners' evidence showed at best a "slight" effect on such commerce. Pet. 14a. Given the dearth of petitioners' evidence, this decision was fully consistent with the Court's rule that empirical evidence must be presented to support a claim of discriminatory or burdensome effect on commerce. *Am. Trucking Ass'ns v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 436 (2005).

3. The Purported Confusion or Circuit Split Concerning Application of the Rational Basis Test Is Illusory.

Petitioners focus on statements by the court prior to its ultimate decision on appeal, including two select statements from a panelist at oral argument, to suggest that the Seventh Circuit harbors doubts about the State's interest in the Amendment. See, *e.g.*, Pet. 27-28 (citing Pet. 80a, 82a). But of course it is only the court's ultimate decision that has the force of law, and in that decision the court affirmatively rejected petitioners' claim that the Amendment lacks a rational basis. Pet. 15a, 10a. This conclusion followed from a straightforward application of this Court's and circuit precedent.

Petitioners also complain that the court articulated its own rationale for the Amendment—"ending an

inducement to slaughter" horses (Pet. 26)—and even suggest that this is itself grounds for review (Pet. i, 27). But this suggestion fails for multiple reasons. First, as set out below (at pp. 20-21), the rational basis test considers any "hypothesized justifications" for a law. Second, the court did not rely on this "inducement" theory as the sole (or even the primary) rational basis for the Amendment. Rather, the court ultimately concluded that the Amendment was a proper expression of "disgust at what people do with the dead, whether dead human beings or dead animals." Pet. 12a.[2] Finally, the State had, in fact, identified an interest in preventing the slaughter of these companion animals (see *supra* p. 4; Pet. 37a-40a), and petitioners' willingness to pay money for horses is not

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[2] Petitioners contend that "the moral judgment of the government majority" is insufficient for the rational basis test (Pet. 28), but they make no meaningful argument to this effect, and indeed any such argument would conflict with the rule that "[t]he States have the power to make a morally neutral judgment that . . . commerce in [certain] material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize in Mr. Chief Justice Warren's words, the States' right . . . to maintain a decent society." *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 69 (1973) (internal quotation marks omitted). Indeed, it is well established that regulation of morals is a valid state interest (*Champion v. Ames*, 188 U.S. 321, 356-57 (1903)), as is regulation of animals (*Nicchia v. New York*, 254 U.S. 228, 230-31 (1920)), and compassion for them (*Paris Adult Theater I*, 413 U.S. at 69 n.15).

some distinct problem articulated for the first time in the appellate court; it is simply the reason why, without the Amendment, horses would be tendered to petitioners for slaughter.

Petitioners also imply that the Court has reserved the question of whether a State's counsel may propose a "post hoc rationalization." Pet. 27. For the reasons just stated, however, the "inducement" rationale was not a post hoc rationalization, nor was it the primary rational basis on which the Seventh Circuit relied. In any event, both cases petitioners cite on this score concern facially discriminatory laws that were not subject to the rational basis test in the first place: *Hughes* (facial discrimination against interstate commerce); and *Craig v. Boren*, 429 U.S. 190, 197-98 (1976) (overt gender discrimination). Petitioners' other two authorities are likewise in accord with the Seventh Circuit's rational basis analysis and finding. Those cases involved laws that had no conceivable relation to their proffered rationales. In *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 449-50 (1985), a zoning ordinance that required special use permits for group homes for the mentally retarded, but not for other multiple dwellings, was not rationally related to the government's asserted interests, *i.e.*, unsubstantiated fears of elderly residents, negative views of nearby property owners, proximity to a school (with mentally retarded students), the possibility of a flood, and the size of the home. Similarly, in *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973), denying food stamps to households that included someone unrelated to another household member was not rationally related to the asserted interests in

maintaining adequate nutrition, stimulating the agricultural economy, and minimizing fraud.

Here, by contrast, there are several plausible, reasonable policy reasons for the Amendment, some of which were even explicitly articulated by Illinois legislators, and the relationship between those policies and the Amendment is not attenuated in a way that would render the Amendment arbitrary or irrational. Indeed, the legislature provided multiple reasons for the Amendment: ensuring that horses, like cats and dogs and other companion animals, are allowed to die of natural causes or be euthanized, and preventing animal cruelty, in the form of slaughtering horses just because they have outlived their economic usefulness. See *supra* p. 4. Respondents asserted animal welfare as a basis for the Amendment throughout the litigation, and the district court relied on that interest. Pet. 37a-40a. Similarly, the Seventh Circuit relied on (among other things) the State's interest in animal welfare, analogizing the Amendment to bans on bullfighting, cockfighting, and animal abuse and neglect. Pet. 11a-12a. (*Empacadora* suggested still other rational bases when it upheld the similar Texas law: preserving horses, preventing the consumption of horse meat, and removing an incentive for horse theft. 476 F.3d at 336.)

In the end, petitioners are merely criticizing the level of deference afforded by the rational basis test itself: a law "is not subject to courtroom factfinding and may be based on *rational speculation unsupported by evidence or empirical data.*" *F.C.C. v. Beach Commc'ns*, 508 U.S. 307, 315 (1983) (emphasis added). Even "hypothesized justifications" may be used

(*Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002)), and the government need not "actually articulate at *any* time the purpose or rationale supporting its classification" (*Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) (emphasis added)). Moreover, whether a "reasonably conceivable" basis was the legislature's actual rationale is "constitutionally irrelevant." *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (internal quotation marks omitted). The rational basis test is satisfied whenever "there is a plausible policy reason for the classification, the . . . facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger*, 505 U.S. at 11.

The amici, too, disregard these well-established standards when they assert that the Amendment lacks a rational basis because, they say, ultimately it will not achieve its goal. American Quarterhorse 8-19. That argument, however, conflicts with several rational basis test principles: (1) courts may not second-guess a legislature's empirical judgments (*CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 92 (1987)); (2) an imperfect fit between a law and its effects does not render it unconstitutional (*Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 85 (1988)); and (3) a law's rationale may be "probably not true" in most cases[3] (*Nev. Dep't of Human Resources v. Hibbs*

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[3] Amici's speculation about unintended consequences of the Amendment (Horsemen's Council

538 U.S. 721, 735 (2003) (internal quotation marks omitted)). And although some amici claim that the Amendment is the final step rather than the first (Horsemen's Council 19-22), the rational basis test asks only whether the Illinois General Assembly could have reasonably believed that at least some of the many thousands of horses that would otherwise be slaughtered by Cavel are not killed before the end of their useful lives. Moreover, if the Amendment should prove as ineffective as petitioners and their amici claim, the legislature may take additional measures.

4. The Purported Circuit Split Involving the *Pike* Balancing Test Is Illusory and Would Not Be Implicated by This Case in Any Event.

After holding that petitioners failed to show that the Amendment discriminates facially or in effect, or that it failed the rational basis test, the lower courts properly applied the *Pike* balancing test, under which the Amendment must be upheld unless petitioners showed that any burden it places on commerce is "clearly excessive in relation to the putative local

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3-22) is contrary to experience elsewhere. In 1999, California banned selling horses for slaughter for human consumption, but saw no increase in neglected or starved horses. *Horse Illustrated*, July 2002 at 96 (quoting Carolyn Stull, Ph.D., an animal welfare specialist at the Veterinary Medical Extension of the University of California, Davis). And although horses could be transported to neighboring states for slaughter, this would decrease the profit and thus was unlikely. *Id.* at 98.

benefits." 397 U.S. at 142. As noted above, petitioners were obliged to present empirical evidence of this burden (*Am. Trucking*, 545 U.S. at 436), yet they did not (Pet. 32a-33a, 14a). Because petitioners' evidence showed that the Amendment's burden on foreign commerce was no more than "slight" — perhaps even less than 1% worldwide — that *de minimis* burden by definition could not "excessively outweigh" the State's interests in animal welfare. Under these circumstances, petitioners' complaint that the Seventh Circuit did not explicitly consider how to achieve the State's purpose with less impact on the market, as *Pike* requires (Pet. 29 n.7 (citing 397 U.S. at 142)), makes little sense. Moreover, the Seventh Circuit's conclusion (unlike petitioners' argument) was wholly consistent with that of the only other circuit court to address this issue: *Empacadora* held that the State's interest in animal welfare was advanced by completely banning horse meat for human consumption, and that "it is a matter of commonsense" that this interest was not being served by the existing alternatives. 476 F.3d at 336.

Petitioners and their amici make much of the Seventh Circuit's aside that circuit courts disagree about whether *Pike* is available to plaintiffs who do not demonstrate "at least 'mild' discrimination." Pet. 21-22 (citing Pet. 8a-9a). The Seventh Circuit quickly explained, however, that any disagreement about whether to apply *Pike* was academic because a law with no rational justification is unconstitutional (under the Due Process Clause) even if it is nondiscriminatory (Pet. 9a-10a), and any disagreement over *Pike* would be immaterial to this case in any event, for the Seventh Circuit applied *Pike* (Pet. 8a-12a), meaning petitioners

obtained the benefit of its standard even without a threshold showing of discrimination. Petitioners also stress the Seventh Circuit's aside about *Pike*'s usefulness due to the overlap between *Pike* and due process analysis, under which a law will be held invalid if it has no rational basis (Pet. 22 (citing Pet. 10a)), but the Seventh Circuit recognized that it did not need to pursue that question (Pet. 10a). In any event, the Seventh Circuit applied *Pike* here, correctly.

5. There Is No Confusion or Circuit Split About *Japan Line*'s "One Voice" Test.

Because the Amendment is nondiscriminatory and passes both the rational basis test and *Pike*'s balancing test, petitioners could prevail only if they presented empirical evidence on the "more extensive constitutional inquiry" *Japan Line* requires for Foreign Commerce Clause claims. They did not.

As explained above, petitioners presented no evidence of the Amendment's burden on foreign commerce, not even the most fundamental fact of all—Cavel's share of the commerce in horse meat for human consumption in Europe or elsewhere abroad. Petitioners criticize the Seventh Circuit for looking at the price of horse meat in Europe, on the ground that the Foreign Commerce Clause protects our country's commerce with other countries, not global markets. Pet. 24 (citing Pet. 14a). The court, however, merely acknowledged the unremarkable point that a price increase could have been empirical evidence that demonstrated the Amendment's effect on the supply and thus on foreign commerce.

Belgium attempts to rescue petitioners by providing additional evidence of the Amendment's effect on foreign commerce in horse meat for human consumption. Belgium 2. But an amicus may not present facts relating to the case at hand that are not already in the record. Eugene Gressman *et al.*, *Supreme Court Practice* 727-28 (9th ed. 2007). Thus, Belgium may not ask the Court to consider this new evidence in the first instance. And in any event, Belgium's attempt fails, for it appears to cover the period before the Texas law at issue in *Empacadora* closed the other two horse slaughterhouses in the United States, and thus may not take into account the effect of the Texas law on commerce in horse meat for human consumption. And even assuming Cavel alone were the third largest supplier of horsemeat for human consumption to Europe, as Belgium implies, its market share may be less than 0.8% of the world market, as the record indicates. Doc. 134 at 54. If so, the Amendment's effect on foreign commerce in horse meat still would be only de minimis.

Petitioners also presented no evidence on *Japan Line*'s "one voice" test, such as any formal or informal opposition to the Amendment by the federal government or any of its trading partners, as the Seventh Circuit observed. Pet. 14a. Petitioners point to the Foreign Affairs Minister's letter (Resp. 4a), but the Seventh Circuit rightly gave the letter no weight — the letter was not one of "protest," which might have demonstrated a need for federal uniformity. Pet. 14a. Rather, it merely stated that Belgium was "scrutinizing" the Amendment. As the district court observed (Doc. 134 at 78), Belgium's scrutiny could have revealed that the Amendment was perfectly

compatible with the federal government's trade obligations.

As noted above, *Japan Line* and its progeny require either a "clear federal directive" or a foreign policy issue for which federal uniformity is essential to invalidate a state law on Foreign Commerce Clause grounds. *Container Corp.*, 463 U.S. at 194. Petitioners tout the federal government's "join[ing]" Cavel's motion to stay the injunction order in *Humane Soc'y*, which they complain the Seventh Circuit disregarded. Pet. 25-26 n.6. They insist that this single sentence, filed only after a court order (Resp. 7a), "speaks to" the federal interest in foreign commerce in horse meat for human consumption. The rules at issue there, however, concerned how inspections at horse slaughterhouses are funded, so that one-sentence document cannot be construed as "speaking to" commerce in horse meat for human consumption. Moreover, to give this single document from the executive branch dispositive weight here would appear to conflict with *Barclays Bank*'s rule that executive branch statements that lack the force of law cannot render a state law invalid.[4] 512 U.S. at 330.

And in any event, far more telling than the federal defendants' tepid support for the stay in Cavel's other

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[4] Contrary to petitioners' belief (Pet. 26), there is no "tension" in the Court's precedents on this point, for the cases they cite merely state two sides of the same coin: the lack of an amicus brief is not, standing alone, enough for a State to prevail on the "one voice" inquiry, and a statement by the executive branch is not, standing alone, dispositive against the State.

appeal are that (1) the federal defendants did not appeal the injunction, or participate in Cavel's appeal in any way, or file any other documents in support of the stay, despite Cavel's candid admission that the stay was necessary for it to operate lawfully (*Humane Soc'y*, 2007 WL 4723381, at *1); and (2) the federal government has neither intervened nor appeared as an amicus at any stage in the instant case (*Container Corp.*, 463 U.S. at 195-96). Even more telling is that Congress refuses to fund the inspections, without which there can be no slaughter of horses for human consumption anywhere in the United States. Consol. Appropriations Act, 2008, Pub. L. 110-161, § 741, 121 Stat. 1844, 1881 (2007).

Petitioners likewise complain that the Seventh Circuit ignored the FMIA, which they call a "congressional finding" that meat regulated by the Act (including horse meat) substantially affects interstate and foreign commerce. Pet. 25 (citing 21 U.S.C. § 602). But this provision is no more than the typical statement used to demonstrate Congress's Commerce Clause authority to regulate a subject matter. Moreover, the Seventh Circuit rejected petitioners' construction of the FMIA, holding that it does *not* require States to allow horses to be slaughtered for human consumption, and instead merely requires that certain procedures must be followed if a State does allow this. Pet. 5a.

Lastly, petitioners perceive two conflicts in this area, neither of which affected the result here and therefore are not implicated in this case. Petitioners are troubled by the Seventh Circuit's dicta questioning whether *Japan Line*'s "one voice" test survived

Barclays Bank. Pet. 22-23, 24 (citing Pet. 10a, 13a-14a). Yet the Seventh Circuit assumed that *Japan Line* survived *Barclays Bank* and then applied it, meaning petitioners received the benefit of its rule and any split would not be implicated here. Pet. 13a-14a. Petitioners also complain that the Seventh Circuit created new law by "adopting a requirement for the quantification of a burden to foreign commerce," but they appear to confuse the "burden" inquiry with *Japan Line*'s "one voice" test. Pet. 24-26. Indeed, the Seventh Circuit's evidentiary analysis was fully consistent with *Am. Trucking Ass'ns'* rule that a plaintiff must support its claim of a burden on commerce with empirical evidence. 545 U.S. at 436.

In sum, the Seventh Circuit's decision is fully consistent with *Japan Line* and its progeny, for petitioners failed to present any evidence that the Amendment impairs the federal government's ability to speak with one voice about foreign commerce in horse meat for human consumption. Indeed, it is petitioners' arguments that conflict with *Japan Line*, *Barclays Bank*, and *Am. Trucking Ass'ns*.

6. *Japan Line* Requires No Additional Articulation.

Petitioners contend that this Court's review is needed because Foreign Commerce Clause cases are few, and lower courts have expressed uncertainty about how to apply them. Pet. 15-19. Even if petitioners were correct (and they are not), this is not a sufficient ground for review in this case, for petitioners do not (and cannot) claim that any method

for resolving this purported uncertainty would change the result here.[5]

Indeed, petitioners merely complain that courts sometimes use different locutions to describe *Japan Line*'s additional considerations for Foreign Commerce Clause claims (Pet. 15-16), but petitioners fail to identify a single case in which different words made a difference in the outcome. Instead, they cite a pre-*Japan Line* state court case upholding a "Buy American" provision in state contracts (*K.S.B. Tech Sales v. N. Jersey Dist. Water Supply Comm'n*, 381 A.2d 774 (N.J. 1977)), and a twenty-year-old case upholding a Delaware ban on product transfer facilities in its coastal zone for (as here) lack of a cognizable burden on foreign commerce (*Norfolk S. Corp. v. Oberly*, 822 F.2d 388, 405 (3d Cir. 1987)). Petitioners also cite a district court case, and they imply (erroneously) that it used the term "super strict" scrutiny (it did not) (Pet. 16),[6] but in any event that

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[5] Thus, for example, petitioners contend that some courts apply the framework developed for dormant *interstate* commerce cases to dormant *foreign* commerce claims, rather than applying stricter review in cases implicating foreign commerce. Pet 15. Even if this were true, the Seventh Circuit applied *Japan Line*'s stricter standard for Foreign Commerce Clause cases, and petitioner therefore received the benefit of the more favorable rule.

[6] Petitioners may be confusing *Japan Line*'s "more extensive constitutional inquiry" for Foreign Commerce Claues cases with the "'strictest scrutiny'"

case merely noted the well-established, "more demanding" inquiry accorded Foreign Commerce Clause claims (that is, an inquiry that goes beyond *Pike* to include *Japan Line*'s "one voice" test), in the course of striking down a law that was discriminatory *per se*. *Nat'l Solid Wastes Mgmt. Ass'n v. Charter County of Wayne*, 303 F. Supp. 2d 835, 840-41 (E.D. Mich. 2004). In short, petitioners' authorities do not support the notion that courts are "struggling" in "uncertainty" when applying *Japan Line*. Pet. 17.

Petitioners also assert that courts and commentators have indicated a need for guidance in Commerce Clause cases, but their authorities do not support them on this point either. Pet. 15-19. For example, in *United States v. Clark*, 435 F.3d 1100, 1103 (9th Cir. 2006), the court expressed uncertainty about the scope of *Congress's* power under the Foreign Commerce Clause, not the *States'* power. And that some commentators may be troubled by the law being undeveloped as to *Congress*'s Commerce Clause power is of no import here. Pet. 16 (citing Kenneth M. Casebeer, *The Power to Regulate 'Commerce with Foreign Nations' in a Global Economy and the Future of American Democracy: An Essay*, 56 U. Miami L. Rev. 25 (2001)). Petitioners' remaining citations merely state the obvious: this Court has not decided many Foreign Commerce Clause cases. *See, e.g.*, *Antilles Cement Corp. v. Acevedo Vila*, 408 F.3d 41 (1st

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given to laws that actually discriminate against out-of-state commerce. *Norfolk S.*, 822 F.2d at 400 (quoting *Hughes*, 441 U.S. at 337).

Cir. 2005); *Hartford Enters., Inc. v. Coty*, 529 F. Supp. 2d 95 (D. Me. 2008).

Another commentator's view that the Court's cases concerning facially neutral laws "seem quite inconsistent" is likewise no cause for concern. Pet. 19 (citing Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, § 5.3, at 433 (3d ed. 2006)). Indeed, Professor Chemerinsky later cautions that "it is important to note that these cases do *not* disagree as to the legal standard: All of the cases indicate that proof of discriminatory impact is sufficient for a facially neutral law to be deemed discriminatory," and that this requires case-by-case analysis. *Id.* at 436 (emphasis added). He also lists several factors that "seem particularly important" on this issue, none of which is present here: excluding virtually all out-of-staters, but not in-staters, from a market; costs on out-of-staters that in-staters do not bear; and a protectionist purpose. *Ibid.*

Lastly, the 14-year period since this Court last decided a Foreign Commerce Clause case cuts against, not for, petitioners' speculation that this issue will surely recur with "increasing frequency." Pet. 5.

II. Petitioners' Amici May Neither Supplement the Evidence in the Record Nor Raise Issues the Petition Does Not.

Apparently dissatisfied with both the legal arguments and the factual record developed below, petitioners' amici make varying attempts to change the nature of the case for the first time in this Court. One rewrites the Questions Presented. Livestock 2-3. Two raise arguments not asserted in the petition or decided

by the Seventh Circuit: a purported burden on interstate commerce in livestock or purported "interference" with the Humane Methods of Slaughter Act (7 U.S.C. §§ 1901-1907) ("Humane Slaughter Act") (Livestock 3-7), and purported conflicts between the Amendment and the United States' obligations under various treaties (Belgium 5-6). In addition, Belgium tries to work in new evidence about the effect of the Amendment on foreign commerce. Belgium 4. But questions not raised or preserved in the Seventh Circuit are not properly raised now (*Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981)), and it is not the Court's usual practice to address issues raised only by an amicus (*Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991)).

Even if amici's conduct were permitted, however, their arguments are not certworthy. One of the new issues the Livestock Association raises is "the critical statutory issue" of the Amendment's purported "interference" with the Humane Slaughter Act, which requires that livestock be rendered insensible to pain prior to slaughter for human consumption. Livestock 3-5. Just as the FMIA does not *require* the States to allow slaughter of horses for human consumption (Pet. 5a), however, nothing in the Seventh Circuit's opinion prohibits use of the captive bolt method when killing horses for other purposes. The other issue the Livestock Association seeks to inject into this case is its *own* cause of action: it argues that the Amendment impermissibly burdens interstate commerce in the market of horses to be slaughtered for human consumption. Livestock 4, 7.

Belgium's brand new issue is that, after having undertaken the scrutiny it suggested in the letter from its Minister of Foreign Affairs, it has concluded that the Amendment "*may* constitute a ban on exports and fall within the scope of Article XI of the" General Agreement on Tariffs and Trade (GATT), though it does not explain how. Belgium 5 (emphasis added). This is too little, too late.

To the extent that Belgium is asking the Court to consider the merits of an alleged GATT violation, moreover, the Court has already held that Congress "foreclosed suits by private persons *and* foreign governments challenging a state law on the basis of GATT in federal or state courts, allowing only the National Government to raise such a challenge." *Crosby*, 530 U.S. at 386 n.24 (emphasis added); see also 19 U.S.C. §§ 3512(b)(2)(A), 3512(c)(1). Tellingly, the United States has not challenged the Amendment. Should a foreign government wish to challenge a state law as inconsistent with the WTO agreement, it may request consultations with the United States at the WTO pursuant to the Understanding on Rules and Procedures Governing the Settlement of Disputes, in which case the United States must consult with the State. 19 U.S.C. § 3512(b)(1)(C).

Belgium is silent about whether the GATT is self-executing and thus binding domestic law. See *Medellin v. Texas*, 128 S. Ct. 1346, 1356 & n.2 (2008). In fact, the GATT is not self-executing. *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 161-62 (2d Cir. 2007) (holding that GATT agreements "are not self-executing and thus their legal effect in the United States is governed by implementing legislation"). Thus, even if the

Amendment were challenged successfully before the WTO Dispute Settlement Body and found to be inconsistent with the United States' obligations under the GATT, that decision would not be binding on the United States. *Corus Staal BV v. United States*, 395 F.3d 1343, 1349 (Fed. Cir. 2005). Instead, the United States Trade Representative, in consultation with congressional and executive bodies and agencies, is authorized to decide whether and how to implement that finding. *Id.* at 1349 (citing 19 U.S.C. §§ 3533(f), (g), 3538); see also *NSK Ltd. v. United States*, 510 F.3d 1375, 1380 (Fed. Cir. 2007).

Belgium also complains that the Amendment "impinges" on obligations in two other treaties (Belgium 6), but this argument deserves little attention. Belgium is not a party to the North American Free Trade Agreement (NAFTA), of course, and petitioners never presented evidence that any party to NAFTA objects to the Amendment. And as with the GATT, only the United States can challenge a state law as inconsistent with NAFTA, and if a NAFTA member challenged a state law inconsistent with NAFTA, the United States must consult with the State in any ensuing dispute settlement process. 19 U.S.C. § 3312. As for the Agreement Between the United States of America and the European Community on Sanitary Measures to Protect Public and Animal Health in Trade in Live Animals and Animal Products (Belgium 6 (citing 9 C.F.R. § 94 *et seq.*)), Belgium cites no particular provision. Such undeveloped arguments are not considered. See, *e.g.*, *South Dakota v. Bourland*, 508 U.S. 679, 697 (1993).

III. This Case Is Not a Proper Vehicle for Resolving the Questions the Petition Presents.

The Court's review is unwarranted on a separate and independent ground.

As noted above, Cavel admitted that it cannot operate without USDA inspections, which Congress refuses to fund. Moreover, Cavel's appeal from a federal district court injunction against the USDA's alternative inspection system has been dismissed as moot.[7] Accordingly, even if this Court were to grant the petition, and petitioners were to prevail on their Foreign Commerce Clause claim, it is unlikely to have any practical effect. Without inspections, no one in the United States may slaughter horses for human consumption, regardless of the Seventh Circuit's decision in this case.

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[7] Cavel's petition for rehearing and rehearing en banc is pending as of the filing of this brief. *Humane Soc'y of the United States*, No. 07-5120 (D.C. Cir.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

OFFICE OF THE GOVERNOR
Rod R. Blagojevich • Governor

FOR IMMEDIATE RELEASE
May 24, 2007

Gov. Blagojevich signs legislation banning the slaughter of horses in Illinois for human consumption

SPRINGFIELD – Governor Rod R. Blagojevich today signed legislation that bans the slaughter of horses in Illinois for human consumption. House Bill 1711, sponsored by State Representative Robert S. Molaro (D-Chicago) and State Senator John Cullerton (D-Chicago), bans importing or exporting horsemeat if any horsemeat will be used for human consumption.

"It's past time to stop slaughtering horses in Illinois and sending their meat overseas. I'm proud to sign this law that finally puts an end to this practice," Gov. Blagojevich said.

The Governor announced his support for the legislation after hearing from advocates, including Bo Derek, actress and longtime activist for the protection of horses, in April. Violations of the new state law are punishable by up to 30 days in jail and a fine of $1,500.

"People were selling horses not knowing that they were being used and treated like livestock and ended up on the slaughter room floor," said Sen. Cullerton. "This bill will ensure that using horses for the purpose of human consumption is illegal throughout the State of Illinois just as it is in 48 other states in the nation."

"I am grateful to my colleagues and the Governor for joining with me in ending this shameless slaughter of these beautiful animals for the sole purpose of ensuring fine dining in European restaurants," said Rep. Molaro.

"There is no domestic market for horsemeat and, therefore, no need for this practice to continue in Illinois," Agriculture Director Chuck Hartke said. "Meat from the slaughtered horses is being shipped overseas to places like Belgium, France and Japan."

Illinois is home to the sole remaining horse slaughterhouse in the United States, Cavel International in DeKalb. Two other horse slaughterhouses in the country, both in Texas, closed earlier this year after an appellate court rejected their appeals of a lower-court ruling that the plants were operating in violation of Texas state law.

"As both a horsewoman and a compassionate person, I applaud the resolve of the people of Illinois to end the cruel, bloody trade in horsemeat," said actress Bo Derek. "My family hails from the State of Illinois and I know they would be proud of the actions taken on behalf of our horses by Gov. Blagojevich, Rep. Molaro and Sen.Cullerton."

"With a stroke of his pen, Gov. Blagojevich has brought the brutal slaughter of horses in the United States to an end. Hereafter, may we only hear of horse slaughter recounted in history books as a sign of how we have progressed in our treatment of these majestic animals," said Chris Heyde, deputy legislative director for the Society for Animal Protective Legislation.

"On behalf of our national coalition that includes thousands of Illinois horse owners, we are deeply grateful to Gov. Blagojevich, Rep. Molaro, Sen. Cullerton, and all members of the Illinois General Assembly who have worked so hard to pass this essential legislation to protect horses from the cruel practice of horse slaughter," said Gail Vacca of Top of the Hill horse farm in Wilmington. "Illinois horse owners are proud today in the knowledge that our state legislature has set the bar in raising the standard for the humane treatment of our nation's horses."

Kingdom of Belgium
The Minister for Foreign Affairs

KABBZ/TL/BA/ap/
Ask for Thomas Lambert
Phone number 02/5014107
annexes) 1
datum

Governor Rod R. Blagojevich
Office of the Governor
207 State House
Springfield, IL 62706

UNITED STATES OF AMERICA

Concern : Horse Bill 1711, amending the Illinois Horse Meat Act

Dear Sir,

Belgium is a traditional horse meat consuming and importing country. It was brought to our attention by Belgian horse meat importers that the State of Illinois has recently approved an amendment to the Illinois Horse Meat Act. This Act seeks to prohibit the purchase, processing, transportation and sale (including exportations) of horsemeat for human consumption. We were also informed of the fact that no consumption of horsemeat takes place in the State of Illinois and that all current producers of horsemeat located in Illinois export their products.

Belgium is amongst one of the destinations of horsemeat from Illinois.

Horse Bill 1711 was enacted by the Illinois General Assembly on May 16, 2007. Given the interest Belgium takes in this type of exportations from Illinois, we will be carefully scrutinizing the compatibility of Horse Bill 1711 with international trade rules, including those existing under the World Trade Organisation.

Attached to this letter you will find some figures about the importance of horse meat consumption from Belgium.

Sincerely,
Vu pour la legalisation de la signature de:

Gezien voor de legalisatie van de handtekening van:

De Gucht, Minister of Foreign Affairs of Belgium
Karel

Washington

N° 4112070613012924

Cette legalisation ne garantit pas l'authenticite du contenu du document.

Deze legalisatie waarborgt de authenticiteit van de inhoud van he) document niet.

/s/ Karel De Gucht

13/06/2007

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE HUMANE SOCIETY OF THE UNITED STATES, et al., Plaintiffs

v.

MIKE JOHANNS, Secretary, United States Department of Agriculture, et al., Defendants.

Civil Action No. 06-0265(CKK)

THE FEDERAL DEFENDANTS' RESPONSE TO THE COURT'S APRIL 2, 2007 ORDER

The Federal Defendants, Mike Johanns, Secretary, U.S. Department of Agriculture, and Barbara J. Masters, Administrator, Food Safety and Inspection Service, respectfully submit this response to the Court's April 2, 2007 Order. In its Order, the Court requested that "[t]he Federal Defendants . . . state their position with respect to Defendant-Intervenor Cavel International, Inc.'s Emergency Motion to Stay by April 3, 2007, at 9:00 a.m., [also] indicating whether they intend to file briefing on this matter." This morning, April 3, 2007, the Court granted the Federal Defendants' motion for an enlargement of time to 3:00 pm today to file their response to the Court's April 2, 2007 Order.

Regarding Defendant-Intervenor Cavel's Motion, the Federal Defendants support the Motion and the relief requested therein, but will not file a brief as the

Federal Defendants' previous filings comprehensively present the Federal Defendants' position.

Respectfully submitted,
/s/ Jeffrey A. Taylor, United States Attorney
/s/ Rudolph Contreras, Assistant United States Attorney
/s/ Beverly M. Russell, Assistant United States Attorney
U.S. Attorney's Office for the District of Columbia, Civil Division
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